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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 30, 1973

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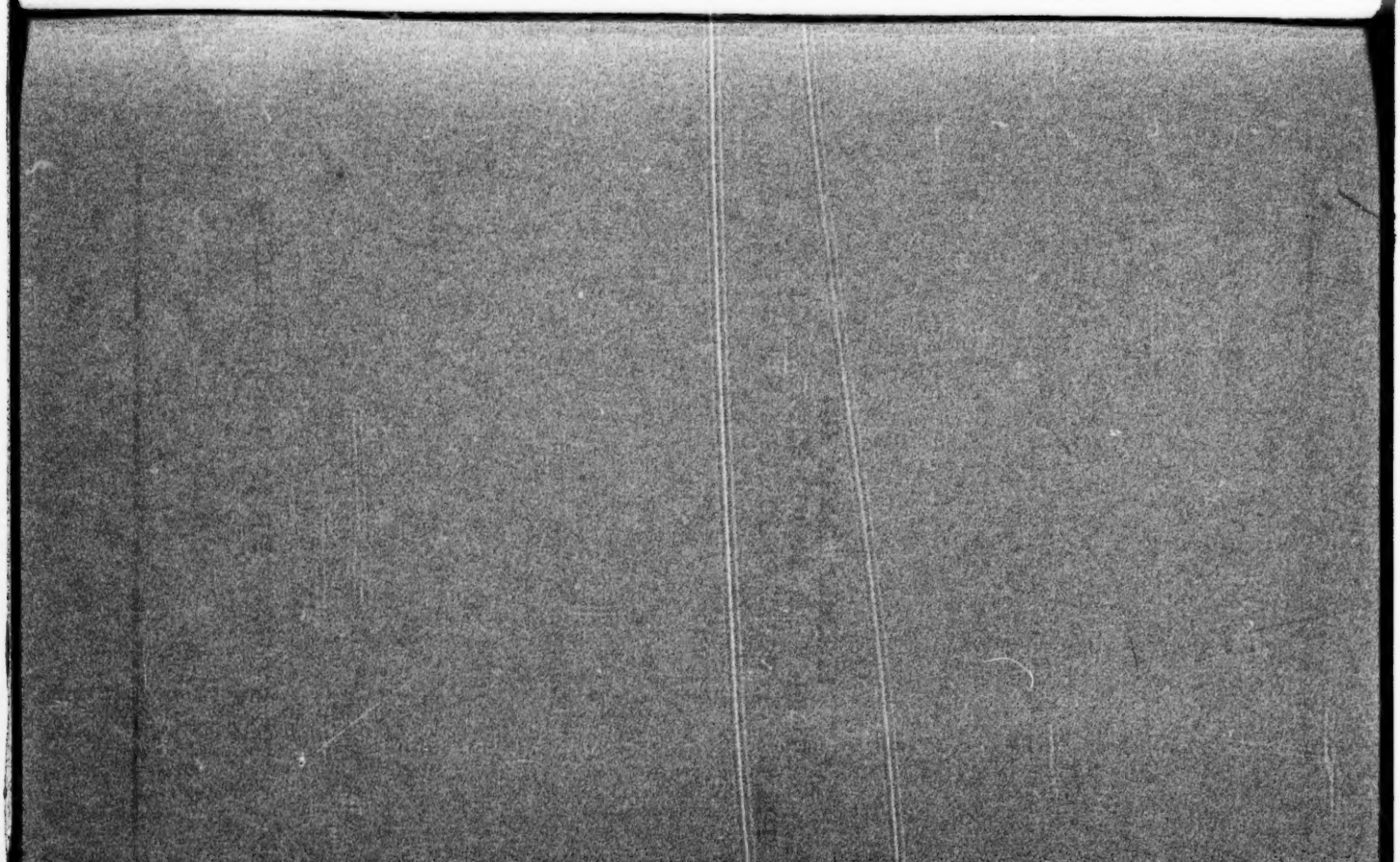

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The petitioner Eugene L. Smaldone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 14, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 1a, *infra*. No opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 14, 1973. A timely petition for rehearing, plus a suggestion of rehearing *en banc,* was denied on August 31, 1973. See Appendix hereto, p. 19a, *infra.* On timely application, Mr. Justice White on September 24, 1973, ordered that the time for filing this petition for writ of certiorari be extended to and including October 30, 1973. This petition was filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal criminal defendant may be denied his established right to inquire as to the present address of a principal Government witness where (a) the sole Government objection is based on immateriality, (b) no claim, showing, objection or finding is made at trial that the question is harassing or that the answer might endanger the witness, and (c) the refusal to allow the question is affirmed on appeal by reliance on matters outside the trial record.

2. Whether, when a Government witness acknowledges at trial that he was earlier interviewed by the prosecutor concerning matters about which he testified and that the prosecutor transcribed the questions and answers on a legal pad, the defendant is entitled to the production of such material under the Jencks Act, 18 U.S.C. § 3500.

3. Whether, when a defendant is charged with a federal crime involving specific intent, it is reversible error to instruct the jury, over the defendant's objection, that "a person ordinarily intends the natural and probable consequences of acts knowingly done or

knowingly omitted . . . unless the contrary appears from the evidence."

4. Whether, in a federal narcotics case, a defendant is entitled, on motion under Rule 16(a)(2) of the Federal Rules of Criminal Procedure to the detailed laboratory findings and memoranda of chemical tests made by Government chemists of the seized narcotics, and, if not, whether the defendant is entitled to a brief continuance during the trial to analyze the reports of the test results that had not previously been tendered.

STATUTE AND RULE INVOLVED

Jencks Act, 18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

* * * * * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule 16(a)(2), Federal Rules of Criminal Procedure:

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due deligence may become known, to the attorney for the government, . . .

STATEMENT OF THE CASE

A. The Proceedings Below

The petitioner Smaldone and one Larry Merkowitz were jointly indicted in the United States District Court for the District of Colorado for violations of federal narcotics laws. Following a jury trial, petitioner was acquitted of two substantive charges,[1] but was found guilty of Count III of the indictment, which had alleged a conspiracy among petitioner, Merkowitz and other named and unnamed persons to import cocaine in violation of 21 U.S.C. § 963. The petitioner was sentenced to ten years imprisonment and fined $10,000. The United States Court of Appeals for the Tenth Circuit on August 14, 1973, affirmed that conviction. See the Appendix hereto, p. 1a, *infra.*

[1] The petitioner was acquitted by the jury of Count II, which had charged him with aiding and abetting the importation of cocaine in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2. He was also acquitted of Count IV, which had charged him with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

The essence of the conspiracy, as alleged in Count III, was that the petitioner and Merkowitz did knowingly conspire "with each other and with Craig Mundt, Ronald Greenspan and other persons whose names are to the Grand Jury unknown," to import cocaine into the United States from Peru during a period from March 29 to June 9, 1972. The overt acts set forth in Count III stated that on May 11, 1972, Merkowitz gave to one Ronald Nocenti $18,500 with which to purchase cocaine in Peru; that the petitioner Smaldone caused a sum in excess of $9,000 to be delivered to Merkowitz to pay for the cocaine; that Greenspan and Mundt met with Nocenti at Aurora, Colorado; that Greenspan and Mundt went to Peru; and that the petitioner and Merkowitz accepted the delivery of the cocaine imported from Peru.

Prior to the return of the aforesaid indictment, the co-conspirators Mundt and Greenspan had been arrested by the Peruvian police. Throughout petitioner's trial, they remained incarcerated in a penitentiary outside Lima, Peru.

The evidence at the trial established that the co-conspirator Merkowitz was a pharmacist who operated a drugstore in Aurora, Colorado, and by his own admission had long been actively engaged in the illegal distribution of drugs. Prior to petitioner's trial, Merkowitz had pled guilty to the conspiracy charge and was provisionally sentenced in accordance with the provisions of 18 U.S.C. § 4208(b) to a maximum term of 15 years imprisonment. Following petitioner's trial, at which Merkowitz testified as a Government witness, Merkowitz was returned to court and the provisional sentence of 15 years was stayed. Merkowitz was thereupon placed on probation for five years and fined $10,000.

Another Government witness at the trial, who was not named as a co-conspirator, was Ronald Nocenti. He testified that he was a paid informer for the Bureau of Narcotics and Dangerous Drugs and that he had actually transferred the cocaine to the petitioner following a trip to Peru. On cross-examination, Nocenti acknowledged that he was given $5,000 in cash by the Bureau of Narcotics and Dangerous Drugs on the day following petitioner's arrest; $3,000 in cash two weeks after he testified before the grand jury that indicted petitioner; and $1,000 per month from the United States Marshal from the date of his grand jury testimony to the date of his trial testimony. He acknowledged that he performed no services for the Government, other than to testify, subsequent to the petitioner's arrest.

B. Cross-examination of Nocenti

The testimony of Nocenti was critical to the Government's case, for it was he who sought to tie the petitioner directly with the conspiratorial importation of concaine from Peru. Prior to the day of his arrest, petitioner had met Nocenti on only one occasion about three years earlier. During that three year interval, petitioner had no contact with Nocenti. Nocenti, as a paid informer, was the only witness who could testify to his conversation with petitioner at the time Nocenti delivered the package of cocaine to him.

Early in his cross-examination of Nocenti, defense counsel (Mr. Shellow) attempted to learn Nocenti's present address:

> Q. (By Mr. Shellow) What is your present address, Mr. Nocenti?

MR. COOPER: I object to that. That is immaterial, Your Honor.
THE COURT: Well—
MR. COOPER: Furthermore—
THE COURT: Are we going to have to call another recess, Mr. Shellow? What is the purpose?
MR. SHELLOW: To place the witness in the context of his environment.
THE COURT: At this time?
MR. SHELLOW: At this time. (T. 299)
THE COURT: No. The objection is sustained.
Q. (By Mr. Shellow) For how long have you lived at your present address, sir?
MR. COOPER: Objection, Your Honor.
THE COURT: Sustained. (T. 300)

No claim or assertion was made by the witness Nocenti that the question as to his present address would in any way harass, annoy or humiliate him; nor did he assert that revelation of his address would expose him to danger of any sort. The prosecutor (Mr. Cooper) likewise made no such claim or objection, merely asserting that the question was "immaterial." And in sustaining the objection that the question was "immaterial," the trial judge made no finding that the question was in any way harassing or that the answer might in any way endanger the physical health or well-being of the witness. Moreover, no document, exhibit or other testimony constituting any part of the trial record demonstrated any such factors bearing upon the request for Nocenti's present address.

Despite the uncontestable fact that the trial record shows only that the trial judge refused to allow the question on grounds of immateriality, the Tenth Circuit on appeal affirmed the refusal on quite different grounds:

(1) The petitioner knew the background of Nocenti and was allowed to cross-examine him in detail and thus "there was not present the usual necessity to bring out the address of the witness; and the defendant was not deprived of knowledge of where he lived and what his business was . . ." See p. 11a, *infra*.

(2) The trial court was said to have been "informed by the prosecution [before trial] that the witness had been relocated because there existed 'an apparent danger to the physical health and well-being' of the witness." See p. 11a, *infra*. This information, the Tenth Circuit said, "was contained in the government's objections to continuance which, although not specifically mentioning Nocenti, clearly referred to his situation." *Ibid.*

(3) Also, said the Tenth Circuit, "the U.S. Attorney had notified counsel for the defendant by letter that 'substantial reason to fear for his safety has been shown and he (Nocenti) has requested that his present whereabouts not be divulged.' " See p. 11a, *infra*.

(4) Relying upon an "organized crime report" that the petitioner had vainly sought to introduce in evidence in support of a pre-trial motion for change of venue, the Tenth Circuit asserted that the petitioner "admittedly had involvement in gambling and at the very least the court could have believed that revealing the address of the witness would stir apprehension in the mind of the witness and thereby affect his testimony." See p. 11a, at footnote 5, *infra*.

(5) Finally, according to the Tenth Circuit, counsel for petitioner "had reason to know that the government would object" to this question, yet "he did not seek to make a showing as to why he needed to

have the information or as to why it would have been proper to allow him to bring it out." See p. 11a, *infra*. Overlooking the record fact that defense counsel sought to ask the question precisely "to place the witness in the context of his environment" (T. 299),[2] the Tenth Circuit viewed this effort of defense counsel "as primarily tactical rather than as a desire to obtain the address." See p. 11a, *infra*.

C. Cross-examination of Merkowitz

Merkowitz, the co-defendant who pled guilty prior to trial, testified as a Government witness. At the trial he testified that all of the money he had given Nocenti for the purchase of cocaine had come from himself and petitioner. That testimony was consistent with three pre-trial statements of Merkowitz which had been produced and given to defense counsel prior to trial.

But there was one pre-trial statement of Merkowitz that was not produced and that appeared to be inconsistent with his trial testimony, a statement in which Merkowitz acknowledged that he had other investors in the cocaine venture. This statement had been given to the Assistant United States Attorney several days prior to trial. The Assistant United States Attorney had made notes on a yellow legal pad during this pre-

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[2] Defense counsel's asserted need to ask this question was taken from this Court's opinion in *Alford* v. *United States*, 282 U.S. 687 (1931). The Court there said: "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting . . . The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." 282 U.S. at 692-693.

trial questioning of Merkowitz. On this matter, Merkowitz testified on cross-examination as follows:

> Q. Now, on the occasion of your seeing Mr. Cooper (Assistant United States Attorney) Tuesday or Wednesday last, as he asked questions of you and you made answers, he wrote down the answers which you gave, did he not?
>
> A. Yes, he did.
>
> Q. And occasionally he would read those back to you to be certain that what he had written down was a correct reflection of what you had said; isn't that right?
>
> A. Yes, sir; that's right.
>
> Q. And on the occasions that he read it back to you, it appeared to be an accurate rendition of what you had just told; isn't that right?
>
> A. Yes. (T. 158-159)

Prior to this series of questions it was clear to the witness that defense counsel was inquiring into matters which were related to the case and to the subject of the direct examination of the witness. (T. 156-158) Merkowitz testified that the answers were written down on a yellow legal pad. (T. 160)

Defense counsel moved for the production of the legal pad under the Jencks Act, 18 U.S.C. § 3500. (T. 160) Initially, the court reserved ruling on the motion (*Ibid.*); the motion was later denied upon the representation by the government that *United States* v. *Myerson,* 368 F. 2d 393 (2d Cir. 1966) held "specifically they are not Jencks Act statements." (T. 222-223) The court also refused counsel's request for an *in camera* inspection of these statements. At the close of the government's case-in-chief the motion was reasserted on authority of *Brady* v. *Maryland,* 373 U.S. 83 (1963); counsel also re-

quested that the court issue a "protective order requiring that these notes be kept by their present possessors in their present condition." The renewed motion and request for a protective order were denied. (T. 576-578) Merkowitz had acknowledged on redirect examination that during the interviews at which these notes were taken he had "given (Mr. Cooper) additional information that was not contained in (his) earlier statements." (T. 265) In denying production of these notes, the trial judge stated:

> THE COURT: Well, the Court's ruling on this is that in view of the testimony here that was related and the taking of notes by Mr. Cooper who is trying the case for the Government, just within the last few days, obviously in preparation for the trial, in the Court's opinion is not a 3500 statement and the request is denied. [See p. 6a, *infra*]
>
> * * * * * * * * *
>
> The latter part pertaining to Mr. Cooper's notes that he made in preparation for the trial of the action, the Court has already ruled that they are not producible, so that the request for the production of those notes and any order of the Court with reference thereto has to do with the attorney's work product, and it is denied. (T. 578)

The Tenth Circuit rejected the trial judge's notion that there is "a work product exception as such" to a defendant's right under § 3500 to secure a prosecutor's notes on interviewing a Government witness. See p. 8a, *infra*. But the appellate court affirmed the trial judge's refusal to order production of the notes on the grounds that (1) an insufficient foundation had been laid for production of the notes; (2) the prosecutor's notes, including "a partial reading back and verification," are not necessarily a "statement" within the meaning of

§ 3500; and (3) "in view of the vast extent of the cross-examination and the extensive prior statements of Merkowitz which were furnished to the defense, we fail to perceive prejudice." See pp. 7a-9a, *infra*.

D. The Instruction as to Intent

In instructing the jury as to the intent required to convict petitioner of the crime of conspiracy, the trial judge stated:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by him." [See p. 15a, *infra*]

The portion of this charge to which the petitioner objected was that which stated that "a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted . . . unless the contrary appears from the evidence . . ." The basis of the objection was that this language had the effect of shifting the burden of proof as to intent and removing from the Government the necessity of proving specific intent beyond all reasonable doubt.

The Tenth Circuit approved this charge, though acknowledging that it "has been much criticized and, in some instances, has been held to be clearly erroneous." See p. 15a, *infra*. In the court's view, "in the context presented the giving of it was not plain error . . . [and] we do not consider the instruction prejudicial." See

p. 16a, *infra*. The instruction, said the Tenth Circuit, "was not given in a manner which emphasized the objectionable clause," other parts of the instruction having "very correctly defined specific intent" and the questioned language having reference only "to proving intent by circumstantial evidence." *Ibid.*

E. The Chemical Tests

Proof that the substance received by petitioner from Nocenti was cocaine was essential to the proof of Overt Act No. 6 of the alleged conspiracy. Accordingly, prior to trial, the petitioner made a written request of the United States Attorney, pursuant to the local District Court Rule 31(c), for "the detailed laboratory findings, memoranda prepared by laboratory chemists, standards of these chemists and any records of the tests which these chemists performed upon the exhibits." This request was refused.

The petitioner then moved the court, pursuant to Rule 16(a)(2), Federal Rules of Criminal Procedure, to order the production of these data. The court denied the motion. At trial, the Government acknowledged that it had tendered to the petitioner only summaries of the laboratory findings and did not tender the requested laboratory analyses and tests.

Upon the tender of the test results during the course of the cross-examination of the Government's chemist at trial, the petitioner moved for a 48-hour continuance to analyze these reports, which had not previously been disclosed, and to confer with experts prior to further cross-examination. That motion was denied.

The Tenth Circuit, relying upon its earlier holding in *Wolford* v. *United States,* 401 F.2d 331, 333 (10th Cir. 1968), ruled that the trial judge had not abused his

discretion in denying the motion under Rule 16(a)(2). The essence of the *Wolford* decision is that it "is not contemplated that the government shall prepare the defense in criminal cases" where the procedures used by Government chemists "were fully explored on cross-examination." See pp. 14a-15a, *infra.*

The Tenth Circuit said nothing, however, about the trial court's refusal to allow a continuance to permit defense counsel to analyze the test results.

REASONS FOR GRANTING THE WRIT

1. The ruling below concerning a defendant's right to inquire as to a prosecution witness' present address is (a) in conflict with prior decisions of this Court, and (b) inconsistent with decisions of other Circuits.

For the express purpose of placing the key prosecution witness in this narcotics case "in the context of his environment," the defense counsel asked him "What is your present address, Mr. Nocenti?" The trial judge immediately sustained the Government's objection that such a question "is immaterial." Thus in affirming that action of the trial judge, the Tenth Circuit has rendered a judgment in direct conflict with this Court's decisions in *Alford* v. *United States,* 282 U.S. 687 (1931), and *Smith* v. *Illinois,* 390 U.S. 130 (1968). Those two decisions establish not only the materiality of such a question but the fair trial ingredient that adheres to the right to ask that question on cross-examination of a prosecution witness.

In *Alford,* a unanimous Court ruled that "the essence of a fair trial" (282 U.S. at 692) in the federal courts includes the right on cross-examination to identify a prosecution witness with his community or environment by asking him the question "Where do you

live?"[3] In *Smith*, the Court escalated that right to a constitutional level, ruling that a defendant in a state criminal proceeding is denied a right protected by the Sixth and Fourteenth Amendments when precluded from asking the correct name and present address of a key prosecution witness.[4]

By premising the effort to secure the witness Nocenti's address on the need to place him "in the context of his environment" and thus to challenge his credibility, the petitioner brought this case precisely within the rationale of *Alford* and *Smith*. Such a question is "an essential step in identifying the witness with his environment" (*Alford*, 282 U.S. at 693) and opens "countless avenues of in-court examination and out-of-court investigation" (*Smith*, 390 U.S. at 131). In other words, cross-examination of this nature must be allowed "so that independent testimony may be sought and offered of . . . [the witness'] reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased" (*Alford*, 282 U.S. at 691-692).

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[3] In *Alford*, the Court noted the fact that upon cross-examination "questions seeking to elicit the witness's place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination." 282 U.S. at 688. The exclusion of the question in the instant case was premised on an identical objection by the Government.

[4] In *Smith*, when defense counsel asked the witness "Now, where where do you live now?" the prosecutor objected. Defense counsel replied, "This is material." The prosecutor repeated "Objection, Judge." The trial judge then ruled: "Yes, objection allowed." 390 U.S. at 131, footnote 6.

The conflict with *Alford* and *Smith* is exacerbated by the efforts of the Tenth Circuit to remove the instant case from the ambit of those controlling decisions. Thus the Tenth Circuit has asserted (see p. 11a, *infra*) that, because defense counsel had been "allowed to cross-examine him [Nocenti] in detail," there was "no lack of knowledge . . . as to the background of the witness Nocenti" and the petitioner "was not deprived of knowledge of where he lived and what his business was as was said in *Alford.*" But exactly the same argument had been advanced in the lower court opinion that was reversed by this Court in *Alford.*[5] And in *Smith,* the Court noted that, as in the instant case, "there was not, to be sure, a complete denial of all right of cross-examination" (390 U.S. at 131) and that it was enough that "there is no evidence in the record that either the petitioner or his lawyer knew . . . where he [the witness] was living at the time of this trial" (*Ibid.,* footnote 6). See also *United States* v. *Dickens,* 417 F.2d 958, 961-962 (8th Cir. 1969), which rejected the Government's argument that since other testimony indicated that the defendant was familiar with the witness and that the witness was placed in his general environment "the requirements of *Alford* . . . were met."[6]

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[5] The lower court opinion that was disapproved in *Alford* had stated: "The witness was examined at great length concerning his relation to the appellant and great latitude was accorded in that examination." 282 U.S. at 691.

[6] The Eighth Circuit in *Dickens* also noted that a similar argument had been made by the Seventh Circuit in *United States* v. *Garafolo,* 385 F.2d 200, 207 (7th Cir. 1967), where the principal witness had been questioned concerning his address at an earlier point in time, his cooperation with the Government in this case, his previous convictions, possible monetary compensation, and possible promises of leniency—but not as to his address at the

But the major effort of the Tenth Circuit to distinguish *Alford* and *Smith* was directed toward placing this case within the so-called exception to the doctrine of those decisions, an exception articulated in Mr. Justice White's concurrence in *Smith* (390 U.S. at 133-134):

> In *Alford* . . . the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling.

Various Circuits have followed and applied the exception as carved out by Mr. Justice White. See, e.g., *United States* v. *Saletko,* 452 F.2d 193, 196 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), and cases there cited; *United States* v. *Alston,* 460 F.2d 48, 52 (5th Cir. 1972), and cases there cited.

Here, the Tenth Circuit purported to find what the trial court had not found — that there existed "an

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time of trial. The Seventh Circuit thought that the witness had been "sufficiently identified with his community to enable appellant to investigate his reputation for truth and veracity in that community." 385 F.2d at 207. On certiorari, this Court vacated the Seventh Circuit's judgment and remanded for further consideration in light of the *Smith* decision, rendered the same day. *Garafolo* v. *United States,* 390 U.S. 144 (1968. On the remand, the Seventh Circuit reversed the conviction and ordered a new trial. *United States* v. *Garafolo,* 396 F.2d 852 (7th Cir. 1968).

apparent danger to the physical health and well-being" of the witness Nocenti, thus justifying the objection to the question as to his present address. See p. 11a, *infra*. It made that finding not by reference to any matter, claim or proof in the trial record but by searching outside that record and discovering:

(a) An inscrutable assertion by the Government in a pre-trial objection to a continuance that such apparent danger existed, an assertion "which, although not specifically mentioning Nocenti, clearly referred to his situation." See p. 11a, *infra*.

(b) A letter to defense counsel from the United States Attorney stating that fears for Nocenti's safety had been shown and requesting that his present whereabouts not be divulged. See p. 11a, *infra*.

(c) An "organized crime report" that the petitioner had sought to introduce in support of a motion for change of venue, which was said to show petitioner's "involvement in gambling." See p. 11a, *infra*. This report, which was not admitted into the record, was said to be such that the trial judge "could have believed that revealing the address of the witness would stir apprehension in the mind of the witness and thereby affect his testimony." *Ibid.*

The ruling below affords an opportunity for this Court to determine the propriety, the meaning and the scope of the exception expressed by Mr. Justice White. If the exception does indeed exist, can the danger be found outside the trial record? If, as Mr. Justice White has indicated, "the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question," should not that showing be made before the trial judge at the point in the trial when the de-

fense counsel seeks to inquire as to the address of the witness? Does not the defense counsel have a right to rebut any showing or claim made at that juncture of the trial? And if such a showing is not required at the time the question is asked, how can there be any assurance that the the trial judge's discretion to disallow the question has been intelligently exercised?

Dealing with some of those questions, the Fifth Circuit has stated that "Of course, it should be the Government that comes forward with an explanation of its objection to the divulging of an address by any witness." *United States* v. *Alston,* 460 F.2d 48, 53 (5th Cir. 1972). Faced with an off-the-record bench colloquy at the time the question was put, the Fifth Circuit nonetheless relied in *Alston* on other matters in the trial record to justify the trial judge's refusal to allow the address to be revealed. The Seventh Circuit has suggested that "one solution may be to require submission by the government of the relevant information to the district judge *in camera* for him to decide whether disclosure would present a real problem. . . . such decision would be reviewable on appeal." *United States* v. *Varelli,* 407 F.2d 735, 750, fn. 11 (7th Cir. 1969). The Tenth Circuit, in its opinion below (see p. 11a, *infra*), ignored the idea of an *in camera* inspection and made a contrary suggestion that the burden is on the defendant "to make a showing as to why he needed to have the information or as to why it would have been proper to allow him to bring it out."

The procedural problems involved in applying the exception created by Mr. Justice White in his *Smith* concurrence continue to plague the Circuits. Moreover, there is every reason to expect that these problems will arise with frequency in the future because of the Gov-

ernment's heavy reliance upon informers in narcotics cases and upon witnesses in organized crime cases. See Public Law 91-452, Title V, §§ 501-504 (1970), 84 Stat. 933. The problems are presented here on a trial record that shows (a) no claim or showing by either the witness or the Government that revelation of the address would endanger the witness, and (b) a sustaining of the Government's objection that the question as to the address was "immaterial." The Tenth Circuit's forced reliance on ambiguous, dated and irrelevant matters outside that record serves to present the procedural problems to this Court in their sharpest and most unavoidable form.

2. The ruling below conflicts with the decisions of another Circuit as to the right of a defendant under the Jencks Act to secure the notes made during the prosecutor's interview of a Government witness.

During the trial, in the light of information adduced during the cross-examination of Merkowitz, petitioner requested the production as a Jencks Act statement of the notes made during an interview of Merkowitz by the prosecutor two or three days prior to trial. The trial judge denied the request on the ground that the prosecutor's notes constituted work product and were therefore not encompassed by the Jencks Act. It also rejected petitioner's subsequent request for these notes on the authority of *Brady* v. *Maryland,* 373 U.S. 83 (1963).

While acknowledging that there is not a work product exception to the Jencks Act production requirements, the Tenth Circuit's holding that the United States Attorney's notes of his interview with Merkowitz are not a "statement" within the meaning of the Jencks Act conflicts with rulings of at least one other Circuit.

To begin with, the Tenth Circuit's approval (p. 6a, *infra*) of the trial judge's refusal to conduct an *in camera* inspection of the prosecutor's notes, given their debatable character as a Jencks Act "statement," is inconsistent with this Court's admonition in *Palermo* v. *United States,* 360 U.S. 343, 354 (1959): "However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* inspection. Indeed, any other procedure would be destructive of the statutory purpose."

The notes in question were not shown to be a truncated version of the interview, and the partial reading back and verification by the witness were not shown to have affected the materiality and relevance of the notes as a whole. Indeed, the witness conceded that his answers contained "additional information that was not contained in earlier statements" (T.265) that were furnished the defense.

In such circumstances, at least one other Circuit has ruled such notes are "substantially verbatim recitals" within the meaning of subsection (e)(2) of the Jencks Act and hence are producible as a "statement". See, e.g., *Saunders* v. *United States,* 316 F.2d 346, 349-350 (D.C. Cir. 1963). Moreover, since the answers given to the prosecutor contained information not otherwise available and which might have been favorable to the defense, production was additionally necessary to insure that there was no "suppression by the prosecution of evidence favorable to an accused." *Brady* v. *Maryland, supra,* 87 (1963). But in its effort to find a different basis to sustain the District Court's concededly erroneous ruling, the Tenth Circuit failed

to recognize the *Brady* implications which arise in denying this information to a defendant.

The problem of when the prosecutor's notes are producible under the Jencks Act is a continuing one that deserves further consideration by this Court. See *United States* v. *Augenblick*, 393 U.S. 348, 354-356 (1969), where the imprecise nature of the record precluded this Court from making a definitive resolution of the problem. The record here is clear and precise, making it appropriate to grant certiorari to resolve what was left unresolved in *Augenblick*.

3. The ruling below as to the instruction on intent is concededly in conflict with decisions of other Circuits.

The trial judge instructed the jury over petitioner's timely objection that, "unless the contrary appears from the evidence," the jury could infer that a person "ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted." The Tenth Circuit approved that instruction, rejecting petitioner's contention that the instruction had the effect of shifting the burden of proof to the defendant on the issue of intent to conspire.

The court below acknowledged (p. 15a, *infra*) that this instruction "has been much criticized and, in some instances, has been held to be clearly erroneous," citing the critical analysis of the instruction and the citation of the relevant cases contained in Devitt and Blackmar, Federal Jury Practice and Instructions § 13.06 (1970).[7] Among the Circuit decisions holding

[7] ". . . the propriety of using this portion of the charge is now in severe doubt. Although repeatedly criticized * * * an instruction of this general tenure continues to appear in charges to the jury. Its use is an invitation to reversal." Devitt and Blackmar, *supra*, at 277.

that the giving of the instruction is erroneous, and in some instances reversible error, are *United States* v. *Barash,* 365 F.2d 395, 402-403 (2nd Cir. 1966); *Mann* v. *United States,* 319 F.2d 404, 409-410 (5th Cir, 1963); *United States* v. *Driscoll,* 454 F.2d, 792, 795 (5th Cir. 1972); *United States* v. *Guy,* 456 F.2d 1157, 1164 (8th Cir. 1972). Other Circuits, cited in the opinion below (p. 16a, *infra*), have held to the contrary.

Only this Court can resolve the conflict that has split the Circuits on this type of jury instruction. Trial courts should not be required to guess whether they are giving an "invitation to reversal"; if this instruction is impermissible, this Court should say so with clarity.

Particularly in the context of a conspiracy prosecution, where the intent to conspire may be inferred from an otherwise innocent act, it is important that the lower courts be advised whether the jury can be so instructed as to throw the burden on the defendant to disprove that he committed an otherwise innocent act with criminal intent. As was said by the Fifth Circuit in *Mann* v. *United States,* 319 F.2d 404, 409 (5th Cir. 1963), while a jury may be charged that a defendant is presumed to intend the natural consequences of his own acts,

> When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption.

One word need be added as to the Tenth Circuit's view (p. 16a, *infra*) that the instruction was not here

prejudicial since it was "ringed around with charges" correctly placing the general burden of proof on the Government and correctly defining specific intent. That view is in diametric conflict with that expressed by the Fifth Circuit in the *Mann* case, 319 F.2d at 410, which held that the giving of an accurate charge on specific intent and the burden of proof does not cure so erroneous an instruction as that here involved. In the Fifth Circuit's words: "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another instruction."

4. The ruling below raises important problems as to a defendant's right under Rule 16 (a)(2) to secure the detailed laboratory tests and analyses of cocaine seized from him.

The Tenth Circuit hastily disposed of petitioner's claim that he was entitled under Rule 16 (a) (2) of the Federal Rules of Criminal Procedure to a disclosure of the detailed laboratory findings and test records with respect to the cocaine seized from him and Merkowitz, See pp. 14a-15a, *infra*. It merely cited a prior decision of its own to the effect that the Government need not prepare the defense in criminal cases, at least where the laboratory procedures and tests are fully explored on cross-examination.

But Rule 16(a)(2) was not designed to be so easily brushed aside. While the Rule declares that upon motion the court "may" order the reports of "scientific tests or experiments made in connection with the particular case" within the Government's possession, Professor Charles Alan Wright has observed that, despite the Rule's use of the word "may," such materials are "obtainable virtually as of right under Rule 16(a)" and "should now be routinely discoverable." 1

Wright, Federal Practice and Procedure § 253, pp. 506-507 (1969).

In this case, petitioner was tendered two documents by the Government. One merely advised that the substance seized from Merkowitz had been analyzed and found to be pure cocaine; the other advised that the substance seized from petitioner was also pure cocaine. Neither document informed petitioner of the tests or analyses upon which these conclusions were based, nor of the results of those tests. Petitioner was thus unable to cross-examine the Government chemist in the light of the tests he actually performed.[8]

The purpose of Rule 16(a)(2) is not to convert a criminal trial into a game of surprises or to withhold from the defendant vital incriminating information. See *United States* v. *King,* 461 F.2d 53, 57, footnote 5 (8th Cir. 1972). Nor is it designed to permit disclosure only of the conclusions and opinions of an expert witness prior to trial. It necessarily encompasses the scientific tests and transcribed results that petitioner repeatedly sought in this case.

This case thus presents an opportunity for a definitive demarcation of the scientific tests and laboratory analyses that should be made available to a defendant under Rule 16(a)(2). The problems are recurring in nature; and the lower courts are in need of this Court's guidance. See *United States* v. *Cook,*

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[8] "Scientific tests may often be the critical evidence linking the defendant to the crime. Since such evidence is given by presumably 'disinterested' experts, it has high probative value to a jury. Moreover, expert witnesses are almost impossible to cross-examine, and expert testimony almost impossible to rebut, without intensive pretrial preparation." 1 Cipes, Criminal Defense Techniques, p. 10-12 (1973)

432 F.2d 1093, 1096-1102 (7th Cir. 1970); *United States* v. *Dioguardi,* 428 F2d 1033, 1038-1039 (2nd Cir. 1970); *United States* v. *Kelly,* 420 F.2d 26, 29 (2nd Cir. 1969). And the problems are here accentuated by the refusal of the trial court to allow a continuance during trial to permit defense counsel to analyze the test reports upon which the Government expert's testimony was based and which had not previously been made available to the defense.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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